No. 17,056

United States Court of Appeals

For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I

APPELLANTS WERE ERRONEOUSLY DEPRIVED OF PRESENTING THEIR GOVERNMENT CONTRACT DEFENSE TO THE JURY

Our point is that by a ruling of the trial court appellants were erroneously deprived of presenting the government contract defense to the jury. The defense was that in leaving the cofferdam in as they did on the day in question appellants were acting pursuant to the contract and directives of the government,

and that such fact exempts them from liability to appellee in respect of that handling of the cofferdam. There is no argument about the doctrine. The issue was one of fact, namely whether appellants were bound by the contract and directives to act as they did. The trial court ruled that they were not, and it therefore declined to present the issue to the jury. We say they were so bound and therefore were entitled to present the defense. In our opening brief we gave our reasons for our contention. We will now respond to appellee's arguments in that respect.

A. Under the Directives and the Contract, Appellants Were Bound Not to Breach the Cofferdam Until They Did.

The evidence shows that about 10:00 A.M. on July 9 appellants suggested to the government that appellants take out their equipment; that the government told appellants not to do so until it would so advise them; that about noon the government told appellants to pull the equipment out; that appellants then began to do so and got most of it out by 5:00 P.M.; that about 4:00 P.M. the government told appellants to breach the cofferdam, i.e., cut a notch in the top of it, which appellants then did; and that about 6:00 P.M. the cofferdam gave way.

Appellee argues that the contract contains no provision requiring appellants to defer breaching, and it says that all we have been able to show in this regard consists of such routine clauses as the ones requiring faithful and energetic prosecution of the work and the rendering of progress reports and allowing the government to order extras.

This is a misrepresentation of our brief, and a failure to meet our argument.

In our opening brief we pointed out the provisions of the contract which we say gave the government authority over appellants in regard to breaching the cofferdam, such provisions as the one giving the government "general direction" of the work, the one requiring appellants to concentrate on getting the permanent dam up to elevation 220 by the end of the first diversion season, the one requiring appellants to work as large a force of men and as much plant as much time as practicable, the one that gave the government the right to terminate the contract for failure to comply with requirements, and so on. We respectfully refer the Court to these clauses, which we have listed in our opening brief (pp. 18 to 23, 26 to 28), and to the fact that breaching would wipe out the cofferdam, the normal result of which would be that the construction of the dam would be suspended until June or July. These provisions, and the all-pervading objective of getting on with the work without delay created a situation in which, we say, it would have been rash for the contractor to have defied the government by breaching the cofferdam on the night of January 8 or the morning of the 9th against the order of the government's representative on the job.

It is easy to look back now, as the government engineer testified, and say that the cofferdam should have been removed earlier. But at the time the government said no, and it was the government's dam, and with the grave consequences of any delay, and with the

clauses of the contract to which we have referred, we say that appellants did *not* have the "unlimited discretion" which appellee claims but were bound to act as they did. At the very least, we say, we had the right to present to the jury the issue of whether we were.

Appellee argues that appellants acted freely with respect to the design, materials and construction of the cofferdam, including raising it from elevation 237 to 250, and it argues that appellants were negligent in those respects.

But those matters are not involved in this appeal. Appellants had discretion with respect to those matters. This appeal is based on the contention that appellants did not have such discretion with respect to breaching the cofferdam on January 8 and 9, and that that gives them the right to the government contract defense as to that issue, and since we cannot tell whether the jury held appellants liable on that issue the deprivation of the defense is prejudicial.

B. Appellants Had the Right to Present the Government Contract Defense to the Jury.

In our opening brief we stated the doctrine of this defense and why it should have been presented to the jury. We now respond to appellee's arguments on this subject.

First, it says that we are now changing our position from that taken at the trial. It says that at the trial we contended that the government contract defense applied to all the alleged acts of negligence of

appellants, and that now we concede it applies only to the claim that appellants were negligent in not earlier breaching the cofferdam.

At the trial there was a long colloquy between the trial judge and counsel on this subject. Contrary to appellee's present contention, appellants' counsel then conceded that the only issue in which he was invoking the government defense doctrine was the one of not having breached the cofferdam earlier. The various items of alleged negligence were explicitly discussed in respect of this very point. The question was whether appellants had been bound by the government contract in respect of those items of work or whether they had discretion to act as they saw fit in those respects. Appellants' counsel then conceded that appellants had had the right to exercise their own discretion regarding the materials of the cofferdam and raising its elevation from 237 to 250. It was then expressly understood that the only matter under discussion with respect to the government contract defense was that of deferring the breaching of the cofferdam until the government permitted it. This is evident from the following:

> "The Court. Now, then, the discretion that seems to be the only one that we have an argument about is the discretion with respect to maintenance of the elevation of the dam, whatever it was, when flood conditions occurred, where you had the right to breach it——
>
> Mr. Driscoll. [attorney for appellants] That's right."[1]

[1]T. 1413. The whole colloquy runs from about page 1377 to page 1415.

Appellee also argues that our proposed instruction on the government contract defense was not limited to the failure to breach but included all the claimed acts of negligence.

The instruction requested by appellants had been prepared prior to the above colloquy. At the end of the colloquy, the trial judge said that the parties would have their chance to amend instructions.[2] The judge had made his position perfectly clear, however. In fact, he later added:

> "It doesn't seem to me that I am going to get into this inherently dangerous argument[3] at all. I am trying to stay away from it. It may be I have committed an error in doing it, but I considered it to be the most difficult question in the case."[4]

In view of the judge's decision on this subject, it would have been useless to amend our proposed instruction to limit it to breaching and ask the court to repeat its ruling.

Besides, the point is presented on this appeal also by the instruction which the judge actually gave. This is the instruction referred to in our Specifications of Error No. 2,[5] in which the court instructed the jury that defendants had discretion to determine whether the cofferdam would be breached.

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[2]T. 1415.

[3]By this he meant the government contract defense.

[4]T. 1436.

[5]Appendix to the opening Brief for Appellants, p. iii.

Appellee argues that we are precluded from our present contention by a stipulation at the trial. That was the stipulation that under their contract appellants had discretion to erect the cofferdam anywhere between elevations 237 and 250, and that when appellants raised it from 237 to 250 they did so without direction from the government.

Appellants' discretion as between elevations 237 and 250 had nothing to do with the question whether appellants could breach the cofferdam on January 8 or 9. Breaching would wipe out the cofferdam altogether, not bring it down to any specified height.

Appellee quotes evidence that diversion of water was the responsibility of appellants, by which is meant the cofferdam. It is true that appellants had to build and maintain the cofferdam. But we say that our custody of the cofferdam was not absolute so that we could breach it with impunity against the express directions of the government.

They say that appellants had discretion to move it up or down between elevations 237 and 250, and that they could have breached at 237 as well as 250. But that is not the question. Breaching it at any elevation would wipe the cofferdam out entirely. The question is whether we had to obey the government's directive in deferring the breaching, and we think that at the very least that question should have been presented to the jury.

C. Whether Appellants Were Bound Was a Question of Fact for the Jury.

Appellee argues that the interpretation of the contract was a matter of law for the trial judge.

As indicated in our opening brief, we disagree. As stated by appellee in its brief, the trial judge received into evidence the contract documents and testimony as to the action of the parties taken under them, and testimony explaining the extent of the responsibility of the parties under the contract documents.

Appellee states that the construction of written instruments is for the trial court and not the jury. That is sometimes true, sometimes not. The distinction is stated in *Hawkins v. Frick-Reid Supply Corporation* (1946), 154 F.2d 88, 89:

> "While the construction of a contract is ordinarily for the court, if the terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact. [Citing cases]"

The rule is also cited in 53 Am.Jur. 229, 230, as follows:

> "Even though a written contract is ambiguous and extrinsic evidence on the matter of intention has been introduced, it is still within the province of the court to construe the writing where the extraneous matter is undisputed and unambiguous. It is only where the extrinsic evidence is unconceded, conflicting, ambiguous, *or such that a reasonable man might draw different inferences therefrom,* that such evidence, with the written

contract, should be submitted to the jury. But where the contract is not clear or is ambiguous, and, *even though the evidence is not conflicting, different reasonable conclusions are possible,* the question is one for the jury." (Emphasis supplied.)

It is also stated at 65 A.L.R. 652:

"It has frequently been held that, even though the written contract is ambiguous and extrinsic evidence on the matter of intention has been introduced, it still is within the province of the court to construe the writing where such extraneous matter is undisputed and unambiguous, and that it is only where the extrinsic evidence is unconceded, *conflicting,* ambiguous, or such *that a reasonable man might draw different inferences therefrom,* that such evidence, with the written contract, should be submitted to the jury. [Citing cases]" (Emphasis supplied.)

Cases cited by appellee do not conflict with the above doctrine. In the *Trans World Airlines* case, the court held that no ambiguity existed. Appellee cites the *Farnsworth* case because of a statement in it that the construction of a contract is for the court even though factual issues are presented as to the meaning and purpose of certain technical and ambiguous terms such as "pilot house" and "shop drawings". Reference to the opinion of the court clearly indicates that it does not conflict with the principles above cited. In the *National Pigments & Chemical Co.* case the parties themselves agreed that the contract was unambiguous, and the court properly held that the contract is

not rendered ambiguous by the fact that at the trial the parties do not agree upon the construction.

We believe that the provisions of the contract in the case at bar required appellants to obey the directives of the government as to breaching the cofferdam. We believe that in any event, the contract is open to that interpretation, and therefore must be considered at least ambiguous in that respect. In that event, the construction of it depends upon all the facts and circumstances, including the facts that this dam was being built for the government, that time was important and any delay serious, that breaching the cofferdam would cause a long delay, that appellants were to stay in the river as long as possible, that the consequences of disobeying a directive of the government on the day in question would be very serious to appellants if the contract were to be interpreted as we have indicated, that inferences were to be drawn from the way the parties acted prior to the flood and during it, and so forth. In other words, the construction of the contract on this important point involved not only the wording of the agreement, but the whole context of events, and we contend that at the very least it must be said that conflicting inferences could be drawn from such a record of facts, and in such case it is a question of fact for the jury to determine the intent of the parties.

D. The Instructions.

We complain of the instruction given by the court. (Spec. No. 2; Appendix, Brief for Appellants, p. iii.)

Appellee says it was based entirely upon undisputed provisions of the contract or concessions of appellants. As we have shown, the terms of the contract and the context of events are open to the opposite interpretation. This is illustrated by the trial judge's own hesitancy, his comment that it was the most difficult question in the case to decide, that he may have committed an error in his ruling, and so on.

Appellee also says that the instruction did not deprive the jury of the right to decide any factual question. On the contrary, it told them that appellants did have the discretion regarding the breaching of the cofferdam, which effectually removed the factual basis of the government contract defense.

The court instructed (Appendix, Brief for Appellants, pp. iv, v) that appellants' contract had nothing to do with appellee's contract, and that the duties of each contractor with the government should not be applied to the other contractor.

That instruction aggravated the error of the previous one in that, according to our contention, it was the duty of appellants under their contract to obey the directives of the government regarding the delaying of the breaching.

The court refused the instruction requested by appellants. (Appendix, Brief for Appellants, pp. i, ii.)

In our argument above, we have covered the contentions of appellee on this point, except one; that is

the argument made by appellee in its brief that the government did *not* tell appellants on January 9 that they could not breach the cofferdam until the government instructed them to do so. This is based on testimony to that effect by Stinson.[6] But that testimony is immediately followed by this further testimony of Stinson, which appellee fails to quote:

> "Q. And no one from the Corps of Engineers told you that you could not pull out your equipment out of the hole until you were instructed to do so, did they?
>
> A. I stated that, that Mr. Jenkinson told us not to pull the pumps out of the hold until he heard from Sacramento.
>
> Q. Now, did he suggest that to you, or did he instruct you that you could do it?
>
> A. He told me not to, that Sacramento told him to tell me to leave the pumps in there".[7]

The direction to leave the equipment in is equivalent to a direction not to breach, because removal of equipment would naturally precede breaching.

E. Exception to Government Contract Defense Doctrine Not Applicable.

Appellee quotes authority that where the contractor departs from the contract specifications or goes beyond them, or does the work specified in a negligent manner he is responsible.

That is true, but the exceptions mentioned are not applicable to the case at bar. Appellants did not act

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[6]Quoted in Brief for Appellee, p. 41.

[7]T. 1522.

at variance with the specifications. And they committed no independent negligence. And if it be claimed that there was issue as to those points, such issues would be given to the jury to decide.

II

IN ANY EVENT, $110,000 OF THE JUDGMENT WAS IMPROPER

In our opening brief, we pointed out that there were four round figure items of damages totalling $110,000, on which the evidence was grossly insufficient to sustain the verdict.

Appellee responds with several contentions, which we will now discuss.

Appellee first challenges our statement that the only evidence to support the four round figures ($50,000 twice, and $5,000 twice) is the testimony of appellee's witness James, and in that respect they cite the testimony of their project manager, Jennett.

But Jennett's testimony does not relate to the point at issue, i.e., the *amount* of the damage. He said there was a money loss due to overtime and loss of momentum from lay off. But we are conceding that, for the sake of argument. The issue is whether there is evidence to support the *amounts,* totalling $110,000.

Appellee cites James' testimony. We too set that out in our opening brief, and we there showed that it was inadequate to support the verdict, as to the $110,000, for several reasons. One was that it was

hearsay, because Mr. James said he based it on estimates of management consisting, as he *understood* it, of Mr. Atkinson and *very likely others.* Another was James' testimony that it was not a *calculated* figure but a judgment of factors *not really susceptible to* calculation, the sort of thing that is incalculable *except through arbitrary factors.* Another reason why the evidence is inadequate on this point is that it offered the jury no basis for determining the amount, that is the pro rata of the expenses of this type which was attributable to the collapse of the cofferdam but gave them merely round figure estimates without the method of computation.

Appellee says we did not object to the testimony. This is not so. Appellants did object, as follows:

> "Mr. Driscoll. Your Honor . . . this gentleman is saying what he has been told. I do have an objection."[8]

Appellee argues that we did not contradict or challenge the figures or introduce evidence that they were excessive. Aside from the fact that the figures were hearsay and therefore did not warrant rebuttal, there was no obligation on appellants to offer evidence on the subject of damages. The burden was on appellee to prove its damages, and for the various reasons mentioned above, it failed to prove the items in question.

Appellee discusses the authorities. There is no dispute as to the legal doctrine.

The general rule is that in a case like this exact computation of the amount of damage is not required.

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[8]T. 607.

But plaintiff must present the best evidence available; that evidence must afford a reasonable basis for estimating the loss; and it must consist of data from which the jury may determine damages and not consist of mere conclusions of witnesses without facts on which the estimate is based.

The evidence here fails to meet these fundamental requirements. There was evidence that damage *was incurred*. But that is not the issue. The issue is the *amount* of the damage. As to that, the evidence fails to meet the requirements above mentioned. It is a series of estimates without reasonable bases, and hearsay. We think it patently insufficient to support the award of $110,000.

CONCLUSION

We respectfully submit that the judgment should be reversed because appellants were erroneously deprived of presenting their government contract defense to the jury.

We further submit that in any event the evidence is insufficient to support the judgment to the extent of $110,000.

Dated, San Francisco, California,
July 17, 1961.

Respectfully submitted,
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